

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

WILLIAM P. NIXON, JR.,

Plaintiff,

v.

MARTHA SUE NIXON,

Defendant.

Shelby Law No. 144305-9 R.D.

C.A. No. 02A01-9512-CV-00287

Hon. Robert L. Childers, Judge

FILED

April 10, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STEVAN L. BLACK and KIMBERLY HARRIS JORDAN, Black, Bobango & Morgan,
Memphis, Attorneys for Plaintiff.

MARTI L. KAUFMAN, Monroe, Shankman & Kaufman, Memphis, Attorney for
Defendant.

REVERSED IN PART AND AFFIRMED IN PART

Opinion filed:

TOMLIN, Sr. J.

William P. Nixon, Jr. ("Husband") filed suit for divorce against Martha Sue Nixon ("Wife") in the Circuit Court of Shelby County on the grounds of irreconcilable differences and inappropriate marital conduct. Wife also filed a counter-complaint against Husband seeking a divorce. Following a bench trial, the court awarded a divorce to both parties. In addition the court set aside certain real estate to Husband as separate property, and found that the appreciation in value during marriage of that property to be marital property, awarding Wife 40% of the appreciated value. The trial court also found that while the parties had entered into a prenuptial agreement that contained a provision expressly prohibiting the payment of alimony, this provision was void as against public policy and awarded Wife rehabilitative alimony.

On appeal, Husband presents three issues for our consideration:

I. (a) Whether the trial court erred in calculating the appreciation in value of Husband's separate property? (b) Whether the trial court erred in classifying the appreciation in value of Husband's separate property as marital property and in awarding forty percent (40%) to Wife in light of (1) terms of the parties' prenuptial agreement or, alternatively, (2) Wife's failure to prove that she made a substantial contribution to its preservation and

appreciation.

II. (a) Whether the trial court erred in finding any appreciation in the value of the Husband's life insurance policies? (b) Whether the trial court erred in classifying said "appreciation" as marital property and in awarding a twenty-five percent (25%) to Wife in light of (1) the parties' prenuptial agreement, or, alternatively, (2) Wife's failure to prove that she made a substantial contribution to the appreciation?

III. Whether the trial court erred in awarding rehabilitative alimony to Wife in light of the terms of the parties' prenuptial agreement?

For the reasons hereinafter stated, we reverse in part and affirm in part.

The essential facts are not controverted. Husband met Wife in 1978. The parties were married in 1982. Husband was 43 years of age at the time of marriage and Wife was 33. Both Husband and Wife had been married previously. Wife had two children from her former marriage, ages sixteen and seven at the time of the marriage. No children were born of the marriage which is the basis of this litigation. The marriage lasted thirteen years.

Some two weeks prior to marriage, Husband and Wife executed a Prenuptial Agreement (hereafter "Agreement"), which set forth in detail the disposition of their respective properties in the event of death or divorce, providing among other things that each party would retain as their separate property all property which each currently owned at the time of the marriage, or thereafter acquired during marriage. In addition, the Agreement contained a provision whereby neither party would be obligated to pay to the other party alimony of any sort, irrespective of fault. [We shall have occasion to examine these two provisions hereafter.]

The Agreement provided that prior to its execution by Husband and Wife, each party was to seek the advice and counsel of a licensed attorney in Tennessee to counsel them regarding their rights under the Agreement. In addition, it stated that each attorney so employed was to execute an oath stating that he had counseled his client regarding the effects and ramifications

of this Agreement, that his client fully understood the contents thereof and had willingly entered into same. These provisions were carried out as reflected by the affidavits of counsel attached to the Agreement.

In addition, both Husband and Wife executed affidavits of their respective net worth that were attached to the Agreement as exhibits. Husband's net worth was stated at \$1,859,300.00 and Wife's net worth was stated at approximately \$38,000.00.

I. Appreciation in Value of Husband's Real Estate.

Husband contends that the trial court erred in finding that the appreciation in value of Husband's separate real estate during marriage constituted marital property and that Wife was entitled to share in this appreciation if she showed she had contributed to it. Husband states that it was likewise error for the court to award Wife 40% of the calculated appreciation.

The Agreement contains the following provision, in part:

3. The Wife at no time during the marriage herein contemplated, or following its dissolution by reason by annulment or divorce, shall have any interest whatsoever occasioned by the marriage, or otherwise, in the property presently owned or hereafter acquired, both real and personal, of Husband, and he shall have the right at all times to sell, exchange, mortgage, and dispose of said property during his life by gift or otherwise. . . .

Paragraph 2 of the Agreement provides the same waivers insofar as Husband having an interest in the Wife's property is concerned. Husband asserts that by virtue of the language quoted above, Wife knowingly waived her rights created by the marriage. He further states that under case law in this state, in prenuptial agreements such as this, the parties can readily contract regarding the disposition of any appreciation in value of their sole property. In support of this contention, Husband cites the case of Perkinson v. Perkinson, 802 S.W.2d 600 (Tenn. 1990). Upon close analysis of Perkinson we are of the opinion that under the facts therein stated, Perkinson supports what the trial court did in the instant

case.

It is appropriate to examine the facts and the holding in Perkinson. The principal asset of wife coming into the marriage was stock in an Anheuser-Busch distributorship, a family business in which wife and some of her children were active, which involved agreements with Anheuser-Busch that could be jeopardized by the potential of the business passing to husband. The recitals in the "Background Facts" portion of the prenuptial agreement set forth the following as circumstances that encouraged its execution:

. . . [u]nder Tennessee law interest in separate property may become marital property for the purpose of division in a divorce suit; application of that law to the parties' circumstances could result in the husband's acquiring an interest in the income and appreciation in value of the wife's separate property. . . .

The heart of the agreement is paragraph 1, which reads in pertinent part as follows:

1. Agreed Distribution on Divorce. If the parties were divorced, Perkinson [Husband] agrees to accept \$150,000.00 in full satisfactory [sic] of his right to any interest in the separate property which Tarver brought to the marriage. Tarver agreed she wants none of Perkinson's separate property brought to the marriage.

In reversing both the trial court and the Court of Appeals, Chief Justice Reid, writing for the court, stated in part:

The purpose of the agreement clearly was to eliminate the possibility that a court might find that during the marriage the husband "substantially contributed to the preservation and appreciation" of the wife's separate property within the meaning of T.C.A. § 36-4-121(b)(1) and declare the income and appreciation in value to be marital property subject to division. . . .

* * * *

The record shows that the contract, in the case before the court, was intended to apply to the appreciation in value of the wife's separate property.

An examination of the Agreement in the instant case reveals that there is no specific provision pertaining to the issue of appreciation in value of separate

property during marriage. Perkinson stands for the proposition that by appropriate language in a prenuptial agreement, the matter of appreciation in value of separate property owned by a spouse may become marital property under certain circumstances, subject to division among the parties, while the non-owning spouse has no real property interest in the separate property.

It is a well-settled rule of law in this state that ambiguities in a contract are to be construed against the party drafting it. Frank Rudy Ayers Associates v. Moore & Associates, Inc. 919 S.W.2d 609, 613 (Tenn. App. 1995). A contract is found to be ambiguous when its meaning is uncertain and can be understood in more ways than one. Id. It is uncontradicted that in the instant case the Agreement was the brain child and product of Husband. As stated in Perkinson, under circumstances such as these appreciation in value of separate property can be dealt with as other property interests, but in attempting to do so the language used should be abundantly clear. In this case, the Agreement, fails to do so. Accordingly, we find that this portion of the issue to be without merit, and hold that the trial court did not err in classifying the appreciation in value of Husband's separate property as marital property, subject to be shared with Wife under appropriate circumstances.

We now examine the amount of appreciation in value as determined by the trial court as well as taking a look at the method the trial court employed in determining this figure. It appears to this court from the record that what the trial court did was this: based upon evidence offered on behalf of Husband, as pertains to the seven parcels of real estate—the property used as the marital residence and six parcels of rental property—the trial court subtracted the balance of the existing mortgage on each piece of property from the fair market value thereof, resulting in a figure which the court labeled "equity", added these seven individual amounts together, subtracted from it Husband's mortgage debt to Nixon Lumber Company of \$339,057.00, which resulted in what we shall call the "net equity", which amounted to \$153,767.00. The trial

court labeled this as "appreciation in value" and proceeded to divide it between Husband and Wife. This method of evaluation constituted error.

The principal error in the court's process of determining the amount of appreciation in value of Husband's separate property was its utilizing the properties' equity, determined by subtracting the amount of the mortgage from the fair market value, as an indicia of appreciation. For example, there might be two identical houses constructed side by side on two identical lots in the same neighborhood, that cost the same to build. One might be encumbered with a mortgage of \$50,000.00, while the other might be encumbered with a mortgage of \$250,000.00. Let's consider further that the cost of each house and lot was \$400,000.00. Under this scenario, while the "equity" of the owner (the amount of cash he would receive upon sale) would be different, nonetheless, fair market value would be the same.

Ordinarily, to prove an appreciation in value of a spouse's separate property during marriage there must be presented evidence that establishes the value of the asset prior to marriage as well as value of the asset at the time of divorce in order to ascertain what the appreciation of value is, if any. This case is complicated by the fact that the parcels of rental property and the marital residence were acquired by Husband during the course of the marriage. It is also readily apparent from the record that both Husband and Wife treated these properties as Husband's separate property. Since these properties were not owned by Husband prior to marriage, if possible, some other date must be used to ascertain these properties' initial value and thereafter to compare this value to the proven market value at the time of the divorce.

While Wife did not offer any such evidence herself, we are of the opinion that the void in this record is filled by evidence offered on behalf of Husband through his accountant, who produced an exhibit showing the "Original Cost Basis" and the "Market Value 5/7/95" of each parcel of property. This evidence reveals that the original cost basis, or value at inception during the parties'

marriage, totaled \$717,514.00, and that the market value at time of divorce was \$985,000.00, presenting a total appreciation in value of \$267,486.00.

In ruling on the contribution of the parties, the trial court stated in part as follows:

The Court has considered the contribution of each party to the acquisition, preservation, appreciation, or dissipation of the marital or separate property including the contribution of the parties to the marriage as homemaker or wage earner and parent.

The statute setting [sic] out that contributions of a party as homemaker or wage earner are to be given the same weight if each party has fulfilled his or her role. The Court finds, and I think the proof is clear in this case, that Mrs. Nixon worked in the home. She worked particularly on the real property, the rental property. Apparently, Mr. Nixon still relies on her to help with that rental property, and she, of course, has worked with St. Nick farms and the animals out there.

The record reflects that the testimony of Husband and Wife contradicted each other on more than one occasion concerning Wife's role in the construction, decoration, and operation of the various pieces of rental properties. Findings of fact of the trial court that are dependant upon the consideration of the credibility of witnesses testifying before him are entitled to great weight. Where an issue hinges on the credibility of the witnesses, the trial court will not be overturned in this regard, unless there is in the record clear, concrete and convincing evidence, other than oral testimony of witnesses that contradicts these findings. Galbreath v. Harris, 811 S.W.2d 88 (Tenn. App. 1990).

We are of the opinion that the trial court correctly determined that Wife made significant contributions to the appreciation in value of Husband's separate property, such as her work on the rental properties, the time spent maintaining the marital residence and her general homemaking activities.

The trial court divided what it considered to be the appreciation of the Husband's separate property 60% to Husband and 40% to Wife. We are of the opinion that this was a proper and appropriate division, and hold that Wife is entitled to 40% of appreciation, amounting to \$106,994.00, while Husband is

entitled to \$160,492.00. This award should be made to Wife as a division of marital property, rather than alimony *in solido*.

II. Husband's Life Insurance Policies.

Next, Husband contends that the trial court erred in finding that the appreciation in value of two life insurance policies owned by Husband and Nixon Lumber Company amounted to \$40,000.00 and that as marital property this appreciation was subject to division between the parties. We are of the opinion that the trial court erred in finding that there was proven to exist an appreciation in value of \$40,000.00, 25% of which was awarded to Wife. The only proof in this record was to the effect that at the time of the divorce the policies had a value of \$40,000.00. There was no proof as to what the value of the policies were at the time of the marriage of the parties. Accordingly, there was no basis on which the court could calculate any increase in value. We resolve this aspect of this issue in favor of Husband.

III. The Prenuptial Agreement and Rehabilitative Alimony.

It is Husband's contention that the trial court committed error in awarding Wife rehabilitative alimony in light of a specific provision in the Agreement, that read in part as follows:

4. That if the marriage of the parties to each other be dissolved by divorce, or any other legal process, irrespective of fault, neither party shall pay to the other party alimony, temporary or permanent, periodic or in lump sum, attorney's fees, court costs, or otherwise. (Emphasis Added).

For years it was well settled in this state that prenuptial agreements that limited a spouse's right to alimony were void as being against public policy. See Crouch v. Crouch, 756 S.W.2d 288 (Tenn. 1964); Kahn v. Kahn, 756 S.W.2d 685 (Tenn. 1988). The law in this regard has been changed. In Cary v. Cary, 937 S.W.2d 777 (Tenn. 1996) our supreme court held that a waiver of alimony in a

prenuptial agreement, entered into voluntarily and knowingly, is no longer void and unenforceable as being contrary to public policy. In so holding, the Cary court stated:

We, therefore, exercise our duty to abolish obsolete common-law doctrines and conclude that antenuptial agreements containing a provision limiting or waiving alimony are not void as contrary to public policy. So long as the antenuptial agreement was entered into freely and knowledgeably, with adequate disclosure, and without undue influence or overreaching, the provision limiting or waiving alimony will be enforced, with one exception.

We agree that the State's interest in providing adequate support for its citizens precludes specific enforcement of such a contract provision if enforcement deprives one spouse of support that he or she cannot otherwise obtain and results in that spouse becoming a public charge. The trial court must examine the terms of the antenuptial agreement at the time of the divorce to insure that its enforcement will not result in the spouse being deprived of alimony, becoming a public charge. If a spouse would be rendered a public charge by specific enforcement, the trial court must void the provision and award alimony in accordance with the factors set out in Tenn. Code Ann. § 36-5-101 (1991 Repl. & Supp. 1995). Id. at Page 7826.

In the light of Cary, we now look at the circumstances surrounding the execution of the Agreement by Husband and Wife and the ensuing results thereof. While the trial court did not make a specific finding that the Agreement was "willingly and knowingly" entered into by Wife, from our reading of the record, it is clear to this court that it was. Husband testified that Wife willingly signed the Agreement and expressed no hesitation at the time it was signed. Wife also readily admitted that she willingly signed the Agreement. Furthermore, there is nothing in the record to indicate undue influence or overreaching on the part of Husband. The Agreement had some built-in safeguards, by providing that each party was to receive separate legal advice regarding the Agreement, and that their respective counsel were to make oath through affidavits that the parties had been duly and properly advised. In the instant case, the attorney who counseled Wife prior to her signing the Agreement testified that she was competent to sign it and understood what she was signing.

The last question remaining to be disposed of is whether or not by virtue of executing this Agreement, Wife was rendered a "public charge" if the Agreement was specifically enforced. We have found no case in this state that defines the term "public charge" in the context of a prenuptial agreement. However, in Tennessee Department of Human Services v. Hinton, 660 S.W.2d 506 (Tenn. App. 1983), this court implied that in order to be considered a "public charge" one would have to receive some form of public welfare or other financial assistance. Subsequently, in State of Tennessee, Department of Human Services for Martin v. Neilson, 771 S.W.2d 128 (Tenn. App. 1989), this court made a reference to "public charge" as it pertained to T.C.A. § 36-2-103(a)(1), that provides that a petition to establish paternity may be brought by the State Department of Human Services if the child has become a public charge or is likely to become a public charge.

Looking at the financial circumstances that Wife was placed in at the time of divorce as a result of signing the Agreement, we cannot say that she will become a "public charge." While the conclusion we have reached will prevent Wife from receiving rehabilitative alimony totaling \$72,000.00 over a three year period, she does stand to receive a sizeable sum of money representing her share of the distribution of appreciation in value of Husband's separate property, which was correctly found to be marital property. The record also reflects that she is otherwise employed and has sufficient experience and training to be employable in the future. In sum, in light of Cary, we reverse the trial court's award of rehabilitative alimony to Wife.

We hold that the trial court did not err in classifying the appreciation in value during marriage of Husband's separate property as marital property, nor did the court err in awarding 40% of the value thereof to Wife, in the form of cash, on the ground that Wife had made a substantial contribution to its preservation and appreciation. We are of the opinion that the trial court erred in determining the amount of appreciation in the value of Husband's separate

property. We further hold that the trial court erred in finding any appreciation in the value of Husband's two life insurance policies and the awarding Wife 25% of this "value." Lastly, as heretofore stated, the trial court erred in awarding rehabilitative alimony to Wife in light of the provisions of the parties' prenuptial agreement.

The judgment of the trial court is therefore affirmed in part and reversed in part. Costs in this cause on appeal are taxed one/half to Husband and one/half to Wife, for which execution may issue if necessary.

TOMLIN, Sr. J.

CRAWFORD, P. J. W.S. (CONCURS)

HIGHERS, J. (CONCURS)